



[2013] JMSC Civ 145

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2012 HCV 0701

W v P

Miss Andrea Moore instructed by Moore Eubanks Moore for the Claimant

Mrs. Judith Cooper-Batchelor instructed by Chambers Bunny and Steer for the Defendant

HEARD: April 01, 29 and September 27, 2013

*Custody – Application for sole custody – Sections 7 and 18 of the Children (Guardian and Custody) Act - Best interest of the child*

HARRIS J (Ag)  
(In Chambers)

Introduction

[1] The claimant by way of a Fixed Date Claim Form filed on February 02, 2012 is seeking sole custody of O with residential access to the defendant on Fridays after school to 2:00 p.m. on Sundays. The defendant has opposed the application.

[2] The claimant's reasons for the application are that:

- (a) the child's grades in school have fallen since he has been residing with the defendant;
- (b) she plays a significant role in his educational development and in particular provides assistance and supervision with his homework each day after school unlike the defendant who is less involved in this area of the child's life;

- (c) the child lived with her until 2009 when the defendant who had temporary custody of him while she was away on a business trip in China refused to return him on her arrival back in the island;
- (d) the living and sleeping arrangements for the child are not in his best interest;
- (e) the defendant has unreasonably restricted the residential access that she has to the child;
- (f) the defendant is a controlling and contentious individual who threatens to withhold financial support of the child whenever he does not get his own way and is verbally abusive of her in the child's presence;
- (g) she is able to provide a stable home environment for O; and
- (h) her financial contribution to the child's educational expenses is greater than that of the defendant

### **Background**

[3] The claimant and the defendant are the parents of O who was born on November 26, 2000. They lived together in the earlier years of the child's life. This situation changed in July 2004 when the parties separated. The child was then about three and a half years old.

[4] After the parties separated, the claimant and O first went overseas. On their return the parties briefly reconciled but eventually the claimant left the defendant's home with the child and went to reside in rented premises.

[5] It is not in dispute that during the time that the parties resided in the same household the claimant was unemployed and that the child and the claimant were fully supported financially by the defendant. This arrangement also continued for awhile after the claimant and O were occupying the rented premises. During this period, the defendant enjoyed residential access to the child on week-ends. He also had liberal access to the child during the week.

[6] In 2005 the defendant applied to the Resident Magistrate's Court for custody. An interim order was made granting the defendant residential access to the child each weekend while O remained in the day to day care and control of the claimant. It would appear that a final order was not made in the court below.

### **Matters in dispute**

#### **(a) The circumstances that led to O living with his father**

[7] It is the claimant's evidence that sometime in 2007 to 2008 O started sleeping over at his father's house. This was as a result, she said, of the defendant's conduct. She stated that whenever the child called the defendant to tell him good night, he would tell him that he would not survive the night without him or that he would die if O did not stay at his house. These conversations would lead to the child asking her to sleep with his father and she permitted him to do so.

[8] She also gave evidence that in 2009 she had to travel to China on business. As was the understanding between them, she left O with the defendant. However, on her arrival home, the defendant refused to return the child to her. His reason, she stated, was that he did not want her to give him cereal for breakfast. The child has been living with him since.

[9] She also stated that as a result of the defendant's behaviour towards her, that is, the escalated bickering and quarrelling about her access to him and his verbal abuse of her which took place at times in the presence of the child, for a peaceful life she allowed O to remain with his father. She also stated that whenever the defendant did not get to have his own way about decisions concerning the child he would threaten to cut off financial support of him. This caused her great concern because of the impact that this could have on O who had become accustomed to a particular standard of living.

[10] The defendant on the other hand has denied that he has ever behaved in an abusive manner to the claimant, that he has ever threatened to withhold the financial support he gives to his child and that O came to live with him in 2007 with the claimant's consent.

**(b) Support given to the educational development of the child**

[11] It is not in issue that the claimant supervises and assists O with his homework each day after school. The current arrangement is that she picks him up after school and takes him to the defendant's home. Once there she stays with him until his homework is completed. Previously, he was taken to her office (located on a building owned by the defendant) where homework was done.

[12] The time that the claimant spends with O to supervise the completion of his homework is disputed. The defendant on the other hand is saying that he gets home usually within forty-five minutes after they get there and the claimant would leave shortly after that. His evidence is that O does his homework on his own and whenever he required help he would assist him.

[13] Evidence was led by both parties concerning extra lessons that were provided for the child when he prepared for an entrance examination for preparatory school and for his Grade Six Achievement Test (GSAT). The parties agree that a tutor was hired in both instances and that on the first occasion the defendant covered the cost in full. On the latter occasion, the defendant paid for some of the lessons but it was the claimant who covered most of the cost. There is documentary evidence to support this.

[14] There is also a letter exhibited with the claimant's second affidavit filed on February 25, 2013 written by the child's tutor. In this letter she stated that when she tutored O in Grades 5 and 6, these classes were initially held at the claimant's office or at her home. She said that it was difficult at times to conduct her classes, especially when the classes were held at the claimant's home.

[15] This she said was on account of the defendant's conduct. He would "often call during classes." This, O's tutor said was quite distracting and on certain occasions classes had to end pre-maturely because the defendant would call to say that he was on his way. When the lessons were held at the office, the defendant would interrupt them to ask O why he hadn't called him after school or to indicate that he would be ready soon. She ended her letter by saying that the child needs to be in a settled environment where he can focus on his schoolwork.

[16] This letter, if accepted, tends to show that the defendant's behaviour was distracting and disruptive during the time that O was receiving extra lessons. This affected not only the child but also his tutor who was not able to conduct her lessons without interference by the defendant.

**(c) Grades**

[17] Exhibited with the claimant's first affidavit filed on February 02, 2012 were three reports from the child's preparatory school. They are dated January 2010, June 2010 and February 2011. The first two captured the child's academic performance in Grade 4 while the latter is for Grade 5. O was living with his father at these times.

[18] The Grade 5 report showed that his all his grades except for Social Studies had slipped. It was for this very reason the claimant said that a tutor was employed taking into consideration that the preparation for the GSAT examinations commenced in Grade 5. However, it is noted that the child's grades in Grade 4 were well above average.

[19] Happily, O was successful in his GSAT examinations and was to attend a prominent traditional high school for boys. However, based upon his preference to continue his secondary education at the school he attended, his parents allowed him to do so.

**(d) Living and sleeping arrangements**

[20] O currently resides with his father at West Armour Heights. This is an upper middle class neighbourhood located in the hills of St. Andrew. This house has eight bedrooms with all the usual amenities as well as a swimming pool. His father's residence is about seven minutes drive from his school.

[21] The defendant has a full time housekeeper who has been employed to him for over fifteen (15) years. Therefore in terms of the general supervision of the child at home no issues have arisen.

[22] The claimant has exhibited some photographs which she said are areas in the defendant's house. These photographs show dust on top of a closet which is alleged to

be in the child's room, as well as mildew in a bathroom. There is also a black spot on an area of the pool. The claimant has stated that the defendant's home is not properly maintained and this has caused O to develop sinusitis.

[23] The defendant said he was unable to recognise some of the pictures and he denied that the black spot on an area of the pool was mould.

[24] The claimant is also contending that O who is now approaching his 13<sup>th</sup> birthday at the insistence of his father sleeps with him every night. The defendant's evidence is that it is the child who wishes to sleep with him each night and he allows him to.

#### **(e) Access**

[25] The claimant has complained that the defendant has unreasonably restricted her residential access to the child. It is agreed that at present O spends only Friday nights with his mother and is picked up by his father on Saturdays.

[26] She stated that it is the defendant who determines the time that he collects the child. She has no control over this. He doesn't spend any time with her during the school holidays. The agreed evidence is that the child spends most of his holidays outside of Jamaica. This, the claimant said, is for the sake of peace between the parties.

[27] The claimant has given evidence that prior to 2010 the defendant permitted O to spend Friday and Saturday nights with her. However, this changed when she became involved in a relationship with another person, with whom she now resides and is engaged to be married. The claimant and her fiancé are to be married in December of this year.

[28] As to the other access she has to her son, this is during the school week when she picks him up from school and takes him to the defendant's home to do homework.

#### **(f) Maintenance**

[29] The claimant complains that the arrangement for the maintenance of the child is unreasonable. It is agreed that the defendant provides accommodation and pays for all

the expenses that accompany that. He also provides lunch money, meals and some miscellaneous items when O requires it.

[30] The claimant on the other hand pays the child's school fees, extra-curricular activities at school including any equipment required for these activities, his books for his Kindle, his shoes and his tested glasses. The defendant makes no contribution towards these expenses.

[31] The defendant on the other hand stated that he contributes \$85,000 per month (\$1.02 million per annum) towards his son's expenses. How this figure is arrived at is at the heart of one of the disputes between the parties.

[32] The defendant is the owner of a commercial complex located in the parish of St. Andrew which houses thirty-nine (39) shops. It is not in dispute that the claimant occupies two shops in that plaza. The defendant's evidence is that the shop on the third floor which the claimant occupies is normally rented for \$70,000 but she pays no rent. The reason she does not pay rent, the claimant said, is because the defendant also has access to this shop and it is shared with his staff. That the defendant has access to this shop is not in dispute. The defendant also said so when he gave evidence.

[33] The other shop occupied by the claimant is on the ground floor of the complex. The defendant said the usual rent for this shop is \$60,000 per month and the claimant pays only \$45,000 for rent. His position is that the rent for the shop on the third floor (\$70,000) and the difference of \$15,000 for the rent of the ground floor shop (\$85,000 per month) is his contribution towards his son's educational and other expenses. He said that the claimant agreed to this.

[34] The claimant has disputed that this arrangement exists between them. She has also stated that the defendant has overinflated the rent for the shops that she occupies. Her evidence is that the going rate for the shops on the ground floor is \$45,000 per month while that for the shops on the third floor is much less than \$70,000. It was put to the defendant that a particular shop on the third floor was rented for under \$47,000. The defendant's response was that it was the claimant who had set the rent for all the shops on the building.

[35] In addition, the claimant has asserted that given the cost of the child's school fees and other educational expenses, as well as, the cost of his extra-curricular and other incidental expenses, the defendant's alleged contribution, would in any event, be grossly inadequate.

#### **(g)The defendant's conduct**

[36] The claimant has alleged that the defendant is controlling and querulous. She said that when it comes to their son, he dictates all the terms.

[37] She has contended that he decided that O was to live with him in 2009 and kept him without her consent after he spuriously asserted that she was giving him cereal for breakfast. He determined the time and place for extra lessons and how much his contribution would be without consulting with her. He decided the terms of the residential access she has with O. He overinflated the rent for the two shops she occupies and then decided that this was his contribution towards the child's educational and other expenses.

[38] The claimant has given evidence that if she had a disagreement with the defendant he would drive to school to pick up O, something which she normally does. This was a mechanism used by him to further restrict the limited access she had with her son. She stated that the defendant was verbally abusive of her in the presence of the child and this abuse of her would worsen whenever he did not get his way. In addition, he would threaten to withhold financial support of the child.

[39] She gave evidence of an occasion when she had gone out to dinner with O and her fiancé and they were late in returning, the defendant used his car to block hers, became enraged and verbally abused her in O's presence. He also took him from her motor vehicle. The defendant on the other hand said it was the claimant's fiancé who advanced in a threatening way towards him and he stood his ground.

#### **The Law**

[40] Section 7 of The Children (Guardianship and Custody) Act allows the court to a make an order for the custody of and access to a child upon the application of the



mother or father. The court is to have regard to the welfare of the child, the conduct of the parents and to the wishes of the mother and father. The modern trend is that the opinion of the child, where he or she is old enough, may also be considered by the court.

[41] Section 18 of this legislation also provides that when the court hears an application for custody the welfare of the child, shall be the first and paramount consideration of the court.

[42] Section 7(3) provides that the court may make a further order for a monthly sum that is to be applied towards the maintenance of the child, given the means of the father and what is reasonable in the circumstances, where custody is granted to the mother.

[43] The court is therefore required to evaluate the evidence presented and determine what is in the best interest of the child.

[44] In **D v M (minor: custody appeal)** 1982 3 All E.R. 898 an authority relied upon by defendant's attorney it was held that the court is required to conduct a 'balancing exercise' to determine what is in the best interest of the child when considering an application for custody..

### **Submissions**

[45] Counsel for the claimant has submitted that it is in the best interest of the child that custody is awarded to the claimant because she supervises his homework in the evenings and she is able to provide a stable and settled environment where he can focus on his schoolwork. She has also submitted that the defendant's controlling and contentious conduct in relation to the access the claimant is allowed to have with her son is not in his best interest. She has also advanced that the current sleeping arrangements of the child is inappropriate for a child of almost 13 years. This she said does little to encourage his independence and development.

[46] Counsel for the defendant on the other hand has asked that it would not be in the best interest of the child to remove him from the home in which he has lived for the last six years. She has also submitted that the evidence presented does not support the

claimant's grounds that she has put forward for getting sole custody. She has further stated that of the two parties, the defendant is the more reasonable of the two as it pertains to access and should custody be granted to the claimant this could result in the claimant restricting the access that the defendant has to his son.

[47] She has also submitted that the defendant is able to provide a better standard of care for his son.

### **Analysis and discussion**

[48] It is clear that both parents deeply love and care for their child. The court also interviewed O. He is an exceptionally bright and intelligent child who loves to read. He shows great promise and is excited about his future.

[49] While the details of the interview with him will not be revealed, the court can safely say that he loves both of his parents very much. The court is aware that as a young child he is susceptible to influence and what he said in the interview was not evidence. The court bears this in mind when taking into consideration what he said.

[50] I am prepared to accept the evidence given by the claimant that the child resided with her until 2009. He has therefore resided with her for most of his life. I also accept the claimant's evidence as to the circumstances that led to O sleeping over at his father's house in 2007 and his eventual removal from her care and control in 2009.

[51] It cannot be ignored that by telling the child that he would die if he did not sleep with him that this was conduct on the part of the defendant that could traumatise him. The court has also noted that the defendant in breach of the order made by the court below removed the child from the claimant's day to day care and control without her consent. Up to 2009, O had lived with his mother for all of his life. This transfer of physical custody would no doubt, have caused O some degree of emotional upset.

[52] The court also accepts the evidence of the claimant, having assessed the demeanour of the parties, that the defendant has been contentious and controlling in respect to the access she has with her son. I accept that her residential access was further restricted in 2010 after she formed a relationship with another person. The

evidence is clear, in my opinion, that the defendant has been reluctant to allow the claimant adequate access to the child. The child, in my view, would have suffered further emotional upset as result of this. It is the conclusion of the court that the defendant, in this regard, has failed to act in the best interest of the child. (See **D v M** supra)

[53] One of the objections that the defendant voiced to the claimant having custody of O concerns the location where the claimant has acquired her home in Stadium Gardens. He stated that this area is not good enough for his son. He also gave evidence that he told the claimant to purchase a piece of land 'further up north' and he would have assisted her with the construction of a home. No consideration, apparently, has been given to the fact that the claimant is about to be married to someone else and this proposal may not be feasible or acceptable.

[54] However he has failed to provide any reason this area is not good enough for his son apart from its geological location. No evidence has been presented by the defendant to convince the court that it would not be in O's best interest to reside with his mother in this area, should she be awarded custody of him. The evidence is that if the claimant is awarded custody of the child, he will have his own room in her home and she would continue to assist him with his school work and see to his general supervision after school.

[55] The fact that the defendant resides in what may be considered to be a more upscale community than that of the claimant and he may well enjoy a higher standard of living than she does, these factors without more, do not conclusively demonstrate that it is in the child's best interest to remain with him.

[56] It is also to be noted that absolutely no evidence has been presented to show that the claimant is an unfit mother. It has not been shown for example that she is neglectful of or indifferent to the welfare of her child. The undisputed evidence before the court is that she is industrious, operates her own business, has recently acquired a home, is in a stable relationship which is to be solemnized later this year, contributes

financially to her child's educational and other expenses and pays keen attention to his school work and education.

[57] I will now address the issue of the child's education which in the opinion of the court is of significant importance. The undisputed evidence is that it is the claimant who supervises the child's homework each evening. The claimant was also proactive in hiring a tutor when his grades slipped and also to prepare him for his GSAT examinations. I find that she pays keener attention to the child's studies and this is in his best interest. I also prefer and accept the evidence given by the claimant as to the amount of time she spends with him during the week supervising the completion of his homework.

[58] The court accepts that the defendant distracted and disrupted O during extra lessons. This was especially so when the lessons were being conducted at the claimant's residence. This is evidence which tends to show again that the defendant not only deliberately restricted the claimant's residential access but also fell short in acting in his son's best interest.

[59] The claimant has taken issue with the manner in which the defendant's home is kept. However, the court is not convinced that this has caused the child to develop sinusitis. It is my view that the matters raised by her can be easily remedied by closer attention being paid to the cleaning, as well as, the maintenance of the house and pool.

[60] As to the child's sleeping arrangements, it is the court's view that given his age and stage of development he is to be encouraged to sleep in his own room and bed. This is essential to his maturity and independence. While it is understandable that he may wish to sleep with his father if ill or when bad dreams occur, it is difficult to see how it is in his best interest for him to sleep with his father every night.

[61] Based on the foregoing it is the conclusion of the court that while the issues of maintenance and access are vexed issues between the parties, the court is of the view that custody of the child will be shared between the parties. This is so because there is evidence that the parties have previously cooperated with each other on other decisions in the best interest of the child. (See **Jussa v Jussa** [1972] 1 W.L.R. 881 and **Fenton v**

**Fenton F 2003/D1797**, a decision of Brooks J (as he then was). The court has concluded however, that it is in the child's best interest that day to day control be given to the claimant with residential access to the defendant.

[62] In coming to its conclusion the court has taken into consideration that O has lived most of his life with his mother, the conduct of the parents and in particular that of the defendant, as well as, the interview that was conducted by the court with the child. The court also bore in mind the totality of the evidence presented, as well as, the applicable law and submissions made by both attorneys.

[63] The court is also mindful that it is in O's best interest to reside with his mother during the school week as he will be better able to focus on his homework and studies in an environment where he is closely supervised, free from distractions and restrictions as to time. Reasonable time can also be allotted during the school week for leisure activities and bond strengthening between his mother as well as his step-father.

[64] The residential access granted to the defendant on the weekends will ensure that O will continue to attend church with his father on Sundays to receive his religious instructions as he has always done. In addition, they will have the opportunity to spend quality time together. The shared holidays between the parties will also enhance the quality time that O will spend with both of his parents. This arrangement, in the court's view, is in the best interest of the child.

[65] I am unable to agree with learned counsel for the defendant that if the claimant is granted custody she will severely limit the time that the father spends with the child and that he is 'open and facilitates liberal access to the mother.' The evidence does not support this and is to the contrary. I find that the defendant has behaved unreasonably as it concerns the issue of access.

[66] No challenge was mounted to the evidence given by the claimant that while the child was in her day to day care and control, the defendant had residential access to him on the weekends. There was also evidence, which again was not challenged, that shortly after she separated from the defendant, he visited the rented premises every

day, even taking breakfast for O most mornings. The undisputed evidence is that she allowed the child to sleep over at his house since 2007 whenever he wanted to.

[67] This is to be compared to the access allowed to the claimant since O has lived with him, that is, a few hours in the afternoon after school for homework and residential access confined to only one night per week since 2010. It is also astonishing that the child is sent abroad when he is on holidays so that peace can reign between the parties. How this can be described as 'open and liberal access' is incomprehensible.

[68] Having awarded day to day care and control of the child to the claimant, the subject of maintenance will now be addressed. As stated earlier, section 7(3) of the Children (Guardianship and Custody) Act provides that where the court under section 7 (1) makes an order giving the custody of the child to the mother, the court may further order that the father shall pay to the mother a weekly or periodical sum towards the maintenance of the child as it thinks reasonable having regard to the means of the father.

[69] It is my understanding that this is a further order the court is permitted to make, in the best interest of the child, even in the absence of a formal application for maintenance provided that the amount is reasonable having regard to the means of the father.

[70] In the case at bar the defendant is the owner of a commercial complex with thirty-nine shops. He has also adamantly asserted that he contributes \$85,000 per month or \$1.02 million per annum towards the educational and other incidental expenses of the child. How this is achieved, I find, is quite untidy and can lead to arbitrariness since it is the defendant who ultimately decides the rent to be paid by his tenants (the claimant being one) for the shops. (See paragraphs 28 to 34 above).

[71] The rent paid for the shops and the maintenance of the child are two distinct obligations. Given the circumstances of this case, it is in the best interest of the child that the parties enter into a more formal agreement concerning the rental and payment of the rent for the two shops that are currently occupied by the claimant. The

contributions to be made by the parties towards O's maintenance, educational and other expenses are not to be tied to that arrangement.

[72] In light of the defendant's declaration of the monthly amount that he currently contributes towards O's expenses, as well as the evidence of his means, the court is of the view that the sum of \$85,000 per month is a reasonable amount to be paid towards the child's maintenance, taking into account the standard of care and the lifestyle that he enjoys.

[73] After making the orders in this matter, learned counsel for the defendant asked that the defendant be afforded an opportunity to address the court on the subject of maintenance. Having considered her submissions I have included an order granting the parties the liberty to apply to the court on this issue.

### **Orders**

1. Joint custody granted to both parties with day to day care and control to the claimant.
2. Access to the defendant every Friday after school until Monday mornings.
3. Alternative mid-term breaks, Christmas and Easter holidays to be shared between the parties commencing with the mid-term break in October of this year which will be spent with the defendant, while the Christmas holiday will be spent with the claimant. The parties will share half of the summer holidays.
4. The defendant will contribute the sum of \$85,000 monthly towards the child's maintenance plus half of his educational, medical, dental, optical and extra-curricular expenses. The sum for maintenance is to be paid into a bank account in the joint names of the claimant and the child at a financial institution agreed by the parties.
5. The parties are given liberty to apply in respect to the issue of maintenance of the child.
6. Costs to the claimant to be taxed, if not agreed.
7. The claimant's attorney-at-law to prepare, file and serve the orders made herein.